TABLE OF CONTENTS

Page

THE INTEREST OF THE TRIBES 1

STATEMENT 2

ARGUMENT 6

I. The History of the Indian Liquor Laws Confirms the Congressional Intent to Control Intoxicants on the Reservation Without Regard to Land Tenure, Except in NonIndian Communities and On Rights-of-way 6

II. The Decision of the Court of Appeals is in Gross Conflict with the History and Purpose of the Indian Liquor Laws 11

A. The court of appeals erred when it struck down as unconstitutionally vague the "non-Indian community" feature of the 1949 Act 12

B. The court of appeals erred when it struck down as unconstitutional, the local option feature of the 1953 Act 14

C. The court of appeals erred when it redefined Indian country and departed from this Court's decision in Seymour v. Superintendent, 368 U.S. 351 (1962) 16

D. The court of appeals erred in equating Indian tribes with citizens' associations 17

CONCLUSION 20

APPENDIX 1a

Page

TABLE OF AUTHORITIES

Cases:

Ash Sheep Co. v. United States, 252 U.S. 159 (1920) 9

Barta v. Oglala Sioux Tribe, 259 F.2d 553 (C.A. 8, 1958), certiorari denied 358 U.S. 932 18

Bates v. Clark, 95 U.S. 204 (1877) 8

Board of Com'rs of Caddo County, Okl. v. United States, 87 F.2d 55 (C.A. 10, 1936) 9

Capoeman v. United States, 194 C.Cl. 664 (1971) 7

Ellis v. Page, 351 F.2d 250 (1965) 12

Federal Power Commission v. New England Power Company, 415 U.S. ___ (1974) 15

Grayned v. City of Rockford, 408 U.S. 104 (1972) 13

Hilderbrand v. Taylor, 327 F.2d 205, 206-207 (1964), certiorari denied 366 U.S. 932 12

Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (C.A. 8, 1956) 18

McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) 18

Morrison v. Work, 266 U.S. 481 (1925) 9

Seymour v. Superintendent, 368 U.S. 351 (1962) 11, 18

Shoshone Tribe v. United States, 82 C.Cl. 23 (1935), reversed 299 U.S. 476 (1935) 3

Shoshone Tribe v. United States, 3 Ind. Cl. Comm. 313 (1954) 3

Squire v. Capoeman, 351 U.S. 1 (1956) 7

United States v. Arizona Tax Commission, 411 U.S. 164 (1973) 7

United States v. Bris, 121 U.S. 278 (1887) 8

United States v. Hellard, 322 U.S. 363 (1944) 15

United States v. Holliday, 3 Wall. 407 (1866) 8

Page

United States v. Kagama, 118 U.S. 375 (1886) 19
United States v. McGowan, 302 U.S. 535 (1938) 14
United States v. Martine, 442 F.2d 1022 (C.A. 10, 1971) 14
United States v. Minnesota, 270 U.S. 181 (1926) 9
United States v. National Dairy Prod. Corp. 372 U.S. 29 (1963) 12
United States v. Native Village, 188 C.Cl. 1 (1969) 7
United States v. Nice, 241 U.S. 591 (1916) 8
United States v. Sandoval, 231 U.S. 28 (1913) 14
Warren Trading Post v. Arizona Tax. Com., 380 U.S. 685 (1965) 18
Williams v. Lee, 358 U.S. 217 (1959) 18
Worcester v. Georgia, 6 Pet. 515 (1832) 18

Constitution, Acts and Treaties:

Constitution of the United States-
Article I, Section 8, Clause 3 7
Article II, Section 2, Clause 2 7
Act of March 30, 1802, sec. 21, 2 Stat. 139 7
Treaty of July 3, 1868, 15 Stat. 673 2
Act of December 15, 1874, 18 Stat. 291 3
Act of February 8, 1887, c. 119, 24 Stat. 388 9
Act of July 23, 1892, c. 234, 27 Stat. 260 8
Act of June 7, 1897, c. 3, sec. 12, 30 Stat. 62 3
Act of March 3, 1905, c. 1452, 33 Stat. 1016 3
Act of February 26, 1927, c. 215, 44 Stat. 1247 9
Act of June 18, 1934, c. 576, sec. 1, 48 Stat. 984 9
Act of July 27, 1939, c. 387, sec. 5, 53 Stat. 1128 3
Act of June 28, 1948, c. 645, 62 Stat. 758 (18 U.S.C. 1151, 1154) 10

Page

Act of May 24, 1949, c. 139, sec. 27, 63 Stat. 94 (18 U.S.C. 1151, 1154) 10

Act of August 15, 1953, c. 502, sec. 2, 67 Stat. 586 (18 U.S.C. 1161) 10

Act of August 27, 1958, c. 487, 72 Stat. 935 3

18 U.S.C. 1151 . . . . . 5, 11, 14, 16

18 U.S.C. 1154 . . . . . 5, 14, 15, 16

18 U.S.C. 1161 . . . . . 5, 14, 15

25 U.S.C. 462 9

25 U.S.C. 575 3

Congressional references:

S. Rept. No. 722, 83d Cong., 1st sess. (1953) 16

H. Rept. No. 775, 83d Cong., 1st sess. (1953) 16

Miscellaneous:

78 I.D. 39 (1971) 16

Cohen, Felix S., *Handbook of Federal Indian Law*, pp. 23, 216, 334-336, 352, 354, n. 35 (GPO 1945) . . . 7, 8, 9

American State Papers, Vol. 7 (1789-1815), p. 655 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1018

UNITED STATES OF AMERICA,

Petitioner,

v.

MARTIN DeWALT MAZURIE, *et al.*,

Respondents.

MOTION OF SHOSHONE AND ARAPAHOE TRIBES OF THE WIND RIVER INDIAN RESERVATION, WYOMING, FOR LEAVE TO FILE BRIEF *AMICI* AND BRIEF *AMICI*

The Shoshone Tribe of Indians and the Arapahoe Tribe of Indians of the Wind River Indian Reservation, Wyoming, move for leave to file the accompanying brief *amici* in support of the position of the United States.

In support of this motion, the Tribes show that they are the real parties in interest and that the decision below denies the protection of the Indian liquor laws to the Indians of the Wind River Reservation.

The Court is respectfully referred to the statement of the interest of the Tribes appearing at pages 1-2 of the accompanying brief.

Respectfully submitted,

MARVIN J. SONOSKY
2030 M Street, N.W.
Washington, D.C. 20036

Attorney for the Shoshone Tribe of Indians

GLEN A. WILKINSON
1735 New York Avenue, N.W.
Washington, D.C. 20006

Attorney for the Arapahoe Tribe of Indians

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1018

UNITED STATES OF AMERICA,

Petitioner,

v.

MARTIN DeWALT MAZURIE, *et al.*,

Respondents.

BRIEF *AMICI* OF THE SHOSHONE AND ARAPAHOE TRIBES OF THE WIND RIVER INDIAN RESERVATION, WYOMING

THE INTEREST OF THE TRIBES

The interest of the Tribes is to preserve the Tribes' sovereignty and rights of self-government over Indians on the reservation and to retain licensing control over the operations of bars and liquor establishments on all parts of the reservation, except fee land in nonIndian communities, and except rights-of-way traversing the reservation.

Over 83% of the reservation is held in trust for the Tribes (78.6%) and for individual Indians (4.6%). (App.,

pp. 1a, 2a, *infra*.)[1] The decision below opens the entire reservation to the sale of intoxicants without regard to the Tribes or their people. It denies the Tribes the protection of the Federal Indian liquor laws. Since the decision of the court of appeals, the Blue Bull bar has reopened; a bar has been relicensed and reopened in the Crowheart community of Indians; a bar has been licensed and opened in Burris also an Indian community and the local county commissioners have issued a liquor license for another bar to be opened at Burris. In addition, two licensed establishments are selling beer only, under State licenses issued by the local county commissioners. (App., p. 2a, *infra*.) All of these establishments are on fee land on the reservation. None is in a nonIndian community. All are operating without regard to the Tribes, the Indian people, or the Federal Indian liquor laws in force on all other affected Indian reservations in the United States.

STATEMENT

The United States established the Wind River Reservation by Treaty of July 3, 1868, 15 Stat. 673. Except for two portions of the reservation sold in 1872 and 1896, respectively, the treaty boundaries have not

[1] The acreages are set out in a letter dated March 28, 1974 from the Wind River Indian Agency printed in the Appendix to this brief and herein cited as "App., p. , *infra*."

Other references in this brief will be:

"R" the one-volume record on appeal, a copy of which the United States lodged with the Clerk; and "Tr." the one-volume transcript of trial proceedings a copy of which the United States lodged with the Clerk.

changed.[2] Today the reservation contains about 2,268,000 acres. Only about 10.1% is owned in fee - mostly by nonIndians. The remainder is held in trust for the Tribes (78.6%), or for individual Indians (4.6%), or is owned by the United States (6.7%). (App., pp. 1a, 2a, *infra*.)[3] Unlike most Indian reservations, the Wind River reservation is a fairly solid block of tribal land. It was not a serious victim of the allotment system, later discussed (*infra*, pp. 8-9).

The reservation headquarters are at Fort Washakie, no doubt established initially as a military fort, now the seat

---

[2] Act of December 15, 1874, 18 Stat. 291 (700,642 acres), *Shoshone Tribe v. United States*, 3 Ind. Cl. Comm. 313, (Fdg. 3(1), p. 314) (1954); Act of June 7, 1897, c. 3, sec. 12, 30 Stat. 62, 63 (55,040 acres), *Shoshone Tribe v. United States*, 82 C.Cl. 23, Fdg. 14, p. 47 (1935), reversed for error in the measure of damages, *Shoshone Tribe v. United States*, 299 U.S. 476. A brief history of the reservation is found in the opinions of this Court and of the court of claims. In 1905 there was a cession in trust opening a portion of the reservation for sale with the proceeds to be credited to the Tribes. Act of March 3, 1905, c. 1452, 33 Stat. 1016 (1,480,000 acres), but substantially all of this was restored to the Tribes by the Act of July 27, 1939, c. 387, sec. 5, 53 Stat. 1128, 1129 (25 U.S.C. 575). The Blue Bull is not on the portion of the reservation affected by the 1905 Act.

[3] The court below observed that "roughly one-fifth of the Reservation" was in fee. (487 F.2d 15.) One-tenth would be more accurate.

The court below also stated that the reservation included "large tracts of Government land" (*idem*, p. 16). Of course, "large tracts" is a relative term, but as employed below the phrase might well convey the wrong impression. The Government owns about 152,530.54 acres, practically all in the federal reclamation projects, and the minerals underlying substantially all of the Government's lands are held in trust for the Tribes. Act of August 27, 1958, c. 487, 72 Stat. 935. (Appendix pp. 1a, 2a, *infra*.)

of tribal government. The governing bodies are the Shoshone Business Council and the Arapahoe Business Council, acting under delegated authority from the people of the respective Tribes. (Tr. 96, 97.)

The reservation headquarters include the principal Federal agencies serving the Indian people, the Bureau of Indian Affairs and the Indian Health Service. The main structures are those housing the Indian Agency offices and shops for Bureau programs, the Indian Health Service clinic and offices, the tribal court, police department and jail, a postoffice, the Tribes' office complex, the Shoshone community center and 49 housing units for federal employees. There are two tribal housing developments with 58 units all occupied by Indians. (App., pp. 2a, 3a, *infra*.)

In the direction of the Blue Bull there are two businesses within 0.7 mile of the Wind River Agency and postoffice, both on nontrust land and both owned by nonIndians. One sells beadwork and Indian handicraft, the other is the Blue Bull. In the opposite direction, about 0.9 of a mile from the postoffice on the main highway is a small motel and trailer court operated by an Indian on trust land. Further on down the main highway, about 1.3 miles from Fort Washakie, is a general store, an auto service station and two self-service laundries. (App., p. 3a, *infra*.)[4]

[4]The court below stated that the proof showed that the Blue Bull "was located from one-half to three-quarters of a mile from the Reservation headquarters at Fort Washakie where there were located about eight business places." (487 F.2d 17.) There are no business places at reservation headquarters. The Blue Bull and the beadwork store 0.7 of a mile from the Agency may be part of the Fort Washakie community but whether the other five business places are part of that community is not clear from the record.

There are no schools, no banks, and no stores or other business places in the Fort Washakie community, unless the bead and handicraft outlet and the Blue Bull are treated as part of the community.

If there is a fire, the Bureau of Indian Affairs' fire equipment responds. There is no other fire department. If there is an offense by an Indian, the tribal police and the tribal courts operating under tribal laws are called upon. There are no other police or courts. The Bureau of Indian Affairs owns the water plant and furnishes domestic water to all in the area, including the Blue Bull. The Bureau of Indian Affairs owns the fire truck and fire-fighting equipment and equips and maintains the volunteer fire department that services the area. (App., p. 3a *infra.*) For all practical purposes, no public services are furnished by anyone except the Bureau of Indian Affairs and the Tribes.

The Blue Bull liquor bar is located, as described above, on a tract of fee land on the reservation. Federal law prohibits the sale of intoxicants on "all land", fee or trust, in Indian country, but the prohibition does not extend to fee land in nonIndian communities on the reservation, or to rights-of-way on the reservation. The statutory prohibition is lifted only if the sale of intoxicants conforms both with State law and an ordinance adopted by the affected tribe, certified by the Secretary of the Interior, and published in the Federal Register. (18 U.S.C. 1151, 1154, 1161.)

The Wind River Tribes, by ordinance duly certified and published, elected to permit the sale of intoxicants by its licensees. Respondents were denied a tribal liquor license to operate a bar located on a tract of fee land in Fort Washakie, or in the vicinity of Fort Washakie, the reservation headquarters. Nevertheless, the respondents'

operated the Blue Bull and sold liquor to Indians and others. Then followed the conviction by the district court, without a jury.

The court of appeals reversed. We read the opinion to stand for the broad proposition that "Indian country", as used in the Indian liquor laws, does not include fee land.

To reach this conclusion, the court of appeals struck down as unconstitutional two major segments of the Indian liquor laws. One, when it ruled that the statutory phrase "nonIndian communities" was so vague as to violate the Constitution. (487 F.2d 17-18.) The other, when it ruled that Congress unconstitutionally delegated its powers to legislate when it conferred the right of local option on Indian tribes (*idem.* p. 18).

The court of appeals also rejected the statutory definition of "Indian country", as interpreted by this Court, and excluded fee land from "Indian country" (487 F.2d 18.) Finally, the court, by way of dictum, employed language that would strip Indian tribes of their sovereign attributes and rights of self-government and downgrade them to "an association of citizens", a "private, voluntary organization". (487 F.2d 19.)

ARGUMENT

I.

THE HISTORY OF THE INDIAN LIQUOR LAWS CONFIRMS THE CONGRESSIONAL INTENT TO CONTROL INTOXICANTS ON THE RESERVATION WITHOUT REGARD TO LAND TENURE, EXCEPT IN NONINDIAN COMMUNITIES AND ON RIGHTS-OF-WAY.

The history of governmental control of liquor in relation to Indians anywhere in the United States, and in relation to all persons in Indian country goes back to

Colonial times. Felix S. Cohen, "an acknowledged expert in Indian law",[5] reports that the initial Federal laws on the subject were motivated in part by the pleas of Chief Little Turtle who spoke to President Thomas Jefferson on January 4, 1802, as follows (*American State Papers*, Vol. 7 (1789-1815), p. 655 cited in Cohen, Felix S., *Handbook of Federal Indian Law*, p. 352 (GPO 1945)):

> ***But, father, nothing can be done to advantage unless the great council of the Sixteen Fires, now assembled, will prohibit any person from selling any spirituous liquors among their red brothers.
>
> * * * * * * * * *
>
> Father: Your children are not wanting in industry; but it is the introduction of this fatal poison which keeps them poor. Your children have not that command over themselves, which you have, therefore, before anything can be done to advantage, this evil must be remedied.

That same year, President Jefferson recommended, and Congress enacted, legislation to regulate the liquor traffic among Indians. Act of March 30, 1802, sec. 21, 2 Stat. 139, 146. And the regulation of liquor traffic in Indian country has been a subject of Congressional concern ever since.[6] Commencing in 1832, there followed a series of

---

[5] *Squire v. Capoeman*, 351 U.S. 1, 8-9 (1956). "We refer to Cohen on Indians as we would to Wigmore on Evidence." *Capoeman v. United States*, 194 C.Cl. 664, 670 (1971). Also, *United States v. Native Village*, 188 C.Cl. 1, 12 (1969).

[6] The authority of Congress is derived from the Constitutional power to regulate commerce among the Indian tribes and from the treaty-making power. (Article I, Section 8, Clause 3; Article II, Section 2, Clause 2.) *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172, n. 7 (1973). That this power is supreme and

federal statutes that in general, prohibited the sale of liquor to Indian wards anywhere in the United States and wholly prohibited liquor in Indian country.[7] The meaning of Indian country as used in the Indian liquor laws, initially presented little difficulty. With few exceptions, Indian reservations were solid blocks of tribal land. And the leading decisions on the point early ruled that "Indian country", as used in the liquor laws, meant land where Indian title had not been extinguished. *Bates v. Clark*, 95 U.S. 204, 207-208 (1877); *United States v. Bris*, 121 U.S. 278 (1887).

But the definition that omitted fee land from Indian country, failed to meet the need after the Government aggressively implemented the allotment system dividing the reservations into individual holdings as a means, in the words of a Commissioner of Indian Affairs, of carrying out "the settled policy of the Government to break up reservations, destroy tribal relations, settle Indians upon their own homesteads,***. The American Indian is to become the Indian American." *Handbook of Federal Indian Law*, *supra*, p. 23.

Commencing in the late 1880's, portions of reservations were broken into individual allotments on a wholesale scale, mainly under the General Allotment Act

---

all-inclusive is no longer open to debate. *United States v. Holliday*, 3 Wall. 407, 418 (1866). As stated in *United States v. Nice*, 241 U.S. 591, 597 (1916): "The power of Congress to regulate or prohibit traffic in intoxicating liquor with tribal Indians within a state, whether upon or off an Indian reservation, is well settled."

[7]Most of the statutes are collected in Cohen, *Handbook of Federal Indian Law*, *supra*, p. 354, n. 35. Cohen identifies the "most important of these measures" as the Act of July 23, 1892, c. 234, 27 Stat. 260, as amended.

of February 8, 1887, c. 119, 24 Stat. 388.[8] In addition, during the period 1890-1916, the Government sold tribal lands not needed for allotments to homesteaders and others, donated such lands to the states and set them aside for townsites, with the proceeds of the dispositions credited to the tribes, pursuant to "cession in trust" agreements between the tribes and the United States, or by statute without tribal consent.[9] Thus, tribal land passed into fee status by transfer to nonIndians, by allotment to individual Indians from whom it passed out of trust status by approved sale, by forcing a fee patent on the Indian without his consent,[10] and by heirship.

The allotment and sale of reservation land resulted in tracts of fee land distributed through the reservations and the creation of small rural towns to serve the homesteaders. Under the decisions, such fee lands were not Indian country for purpose of the liquor laws. (See p. 8, *supra*.) The sale of liquor on small islands of fee land in the midst of Indian country tended to defeat the acts of Congress regulating liquor traffic on Indian reservations.

To cure the situation, Congress, in 1948, defined Indian country by statute to include "all land" in an

[8] Allotments reduced Indian landholdings from 138 million acres in 1887 to 48 million in 1934, when allotments were halted. Act of June 18, 1934, c. 576, sec. 1, 48 Stat. 984, 25 U.S.C. 462. Cohen, *supra*, p. 216.

[9] Examples of such "cessions in trust" are the subject of this Court's decisions. *United States v. Minnesota*, 270 U.S. 181, 210 (1926); *Morrison v. Work*, 266 U.S. 481, 483 (1925), and *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920). See discussion in Cohen, *Handbook of Federal Indian Law*, *supra*, pp. 334-336.

[10] The "forced patent" practice evoked the Act of February 26, 1927, c. 215, 44 Stat. 1247. *See Board of Com'rs of Caddo County, Okl. v. United States*, 87 F.2d 55 (C.A. 10, 1936).

Indian reservation, both fee and trust, and all rights-of-way.[11] This 1948 statutory definition permitted unobstructed control of liquor on Indian reservations, without regard to land tenure. But small towns, with predominantly nonIndian populations, located on Indian reservations, complained that the statutory definition was too broad. Prior to the 1948 Act definition, establishments in such towns had been selling liquor on fee land, in reliance on the pre-1948 Act court rulings that fee land on an Indian reservation was not Indian country. The towns wanted that privilege reinstated.

Congress responded by a 1949 amendment that changed the 1948 definition of Indian country to exclude from the prohibitions of the Indian liquor laws, "fee-patented land in nonIndian communities or rights-of-way through Indian reservations***." Act of May 24, 1949, c. 139, sec. 27, 63 Stat. 94 (18 U.S.C. 1151, 1154(c)).

Four years later, Congress wiped out the racially discriminatory prohibition that barred the sale of intoxicants to Indian wards anywhere in the United States. Act of August 15, 1953, c. 502, sec. 2, 67 Stat. 586, (18 U.S.C. 1161). At the same time, Congress granted local option to tribes in Indian country by directing that the Federal Indian liquor laws should not apply "within any area of Indian country" if the liquor transactions were conducted "in conformity" both with State law and a tribal ordinance. In other words, at the option of the

[11] Act of June 28, 1948, c. 645, 62 Stat. 758: "The term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,***."

Tribes, the prohibitions and penalties of the Federal Indian liquor laws could be lifted to allow the introduction and sale of intoxicants on the reservation.

When tested against this historical background, it becomes apparent that the decision below is a grossly erroneous departure from long-standing Federal law and defeats the policy of Congress to regulate the liquor traffic with Indians in Indian country.

II.

THE DECISION OF THE COURT OF APPEALS IS IN GROSS CONFLICT WITH THE HISTORY AND PURPOSE OF THE INDIAN LIQUOR LAWS.

Viewed in the context of history, the decision below is almost inexplicable. The Blue Bull concededly was on the reservation. Either it was a part of the Fort Washakie community, the reservation headquarters, or it was near that community, but off by itself. (In the words of one of the respondents: "***we are kind of out there by ourselves, you know" (Tr. 114).)

To void the judgment of conviction the court of appeals struck down as unconstitutionally vague, the "non-Indian communities" feature of the 1949 Act and struck down as an unconstitutional delegation of legislative power, the local option provision of the 1953 Act. The elimination of these provisions returned the law to its status before the 1949 Act, when the sale of liquor was prohibited on "all land" in Indian country. This left the Blue Bull in violation, unless fee land on the reservation was not Indian country.

Congress had defined Indian country to include "all land" on an Indian reservation (18 U.S.C. 1151), and this Court had interpreted "all land" to mean fee as well as trust land. *Seymour v. Superintendent*, 368 U.S. 351,

358 (1962). Under the court of appeals' rationale, with the "nonIndian communities" and local option provisions eliminated, *Seymour* should have compelled in affirmance of the conviction. But the court of appeals departed from the statutory definition and from *Seymour*, and redefined "all land" to mean "all trust land", thus freeing the Blue Bull to sell liquor on fee land on the reservation without violating the law. (487 F.2d 18.)[12]

Perhaps to bolster the fragile basis for its holding, the court of appeals went on to strip the Tribes of their limited attributes of sovereignty and downgrade them to a "private, voluntary organization" that happened to own land. (487 F.2d 19.) The court of appeals was wrong on all points.

A. The court of appeals erred when it struck down as unconstitutionally vague the "nonIndian community" feature of the 1949 Act.

The court of appeals paid no heed to "the strong presumptive validity that attaches to an Act of Congress", or to this Court's consistent effort to interpret statutes so as to sustain constitutionality. *United States v. National Dairy Prod. Corp.*, 372 U.S. 29, 32 (1963).

This is not a case of a vague law trapping the innocent, or opening the door to arbitrary and discriminatory enforcement, or where the statute "is void for vagueness

[12]This even though the court of appeals, at least twice before, had followed *Seymour's* holding that fee land on a reservation was Indian country. *Ellis v. Page*, 351 F.2d 250, 252 (1965); *Hilderbrand v. Taylor*, 327 F.2d 205, 206-207 (1964), certiorari denied 366 U.S. 932.

if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Here liquor traffic was prohibited in all "Indian country"—as that term was defined by statute. The penalties were removed only if the traffic took place within the exceptions (Indian communities or rights-of-way) to the all-inclusive definition, or if the Tribes consented by ordinance. There is nothing vague about the prohibition.

This is a case where a "person of ordinary intelligence" (408 U.S. 108), would have no difficulty in knowing whether the Blue Bull was in a nonIndian community. Significantly, the court of appeals itself, had no difficulty in declaring that the "term 'nonIndian community' could apply to towns such as Riverton which is located within the exterior boundaries of the Wind River Reservation***" (487 F.2d 17). If the term were as vague as declared below, from what source did the court of appeals gain the confidence to volunteer that Riverton, a town on the reservation, could be a nonIndian community. Although there was no reason to mention Riverton, and it was not considered in the record in this case, we agree that Riverton, with a 1970 population of 7,995, is a nonIndian community.

Certainly, as the court of appeals has demonstrated, the application of "ordinary intelligence" permits one to distinguish between Riverton and Fort Washakie, the reservation headquarters. The same kind of "ordinary intelligence" would inform the Blue Bull's owners that the site of their liquor bar was not a nonIndian community, situated as the bar was off by itself, about 1/2 to 3/4 mile from the tribal and agency headquarters on a reservation 83% held in trust. (See *supra*, p. 1.)

The meaning of the term "nonIndian community" certainly is no less susceptible of determination by the

application of "ordinary intelligence", than are the terms "Indian country" repeatedly defined in the decisions, or the term "dependent Indian communities" included in the definition of Indian country (18 U.S.C. 1151(b)) and defined by this Court and the court of appeals. *United States v. McGowan*, 302 U.S. 535, 538-539 (1938); *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *United States v. Martine*, 442 F.2d 1022, 1023 (C.A. 10, 1971). These cases, including the opinion of Judge Seth in the *Martine* case, emphasize that when necessary to define terms in the Indian liquor laws the judicial approach should be one that will carry out the "policy of Congress, uniformly enforced through the decisions of this Court,*** to regulate the liquor traffic with Indians occupying such a settlement [colony of Indians on 28 acres of land owned by the United States]." *United States v. McGowan, supra*, p. 538.

Indeed, "nonIndian community" is less difficult to define because it permits comparison to an "Indian community". The differences between two such communities are patent as underscored by the court below when it pointed to Riverton as a nonIndian community. (487 F.2d 17.)

B. The court of appeals erred when it struck down as unconstitutional, the local option feature of the 1953 Act.

As part of the Federal design for controlling intoxicants on Indian reservations, Congress prohibited the sale of liquor on the reservation (18 U.S.C. 1154), and in 18 U.S.C. 1161, permitted tribes to decide for themselves whether they wanted liquor on the reservation. There is no validity to the ruling below that this local option feature of Section 1161 was an unconstitutional dele-

gation of legislative power. What Congress did is substantively the same as the common local option provisions of state laws allowing each county and town to decide for itself whether the general prohibition of the liquor laws should be lifted. No delegation of the Congressional power is involved. See *Federal Power Commission v. New England Power Company*, 415 U.S., , n. 1 of concurring opinion (1974).

The court of appeals conceived that the local option feature of Section 1161 delegated to the Tribes the "unrestricted power" to convert what was legal, into a criminal act. (487 F.2d 18.) The opposite is true. The local option feature authorized the Tribes to terminate the Federal prohibition, and make legal what was otherwise illegal. Federal law (18 U.S.C. 1154) prohibits the sale of liquor on the reservation. The Blue Bull could not lawfully be in business, and in fact, did not go into business, until after Section 1161 was enacted and the Tribes, in the exercise of local option, adopted an ordinance in 1953 terminating the Federal prohibition. (R. 74.) But if the court of appeals is right, and local option is a nullity, then the tribal ordinance lifting the Federal prohibition is void, and the Blue Bull is in violation.

The decision below would unnecessarily limit Congress in developing legislation essential for the administration of Indian affairs and necessary to carry out Federal policies that give recognition to the wishes of the Indian people in their own country and to rights of tribal self-determination consistently recognized by the United States. Certainly, Congress could have vested in the Secretary of the Interior the decision of whether liquor should be permitted on the reservation, or it could have placed the decision in the hands of a local court (Cf. *United States v. Hellard*, 322 U.S. 363 (1944), where a

local county court was designated by Congress to fill the function of the Secretary in approving or disapproving alienations of trust land), or it could have left the decision to the Indian people affected, as it did in Section 1161. In each instance an administrative function is performed. In no instance is there a delegation of the power of Congress to legislate.

The matter of liquor on an Indian reservation is peculiarly one of local choice. Here that choice was left to the Tribes as part of the deliberate intent of Congress to recognize the principle of self-government, as evidenced by the legislative history of Section 1161. S. Rept. No. 722, 83d Cong., 1st sess. (1953); H. Rept. No. 775, 83d Cong., 1st sess. (1953). See letter set out in 78 I.D. 39, 42. This too is the view of the Department of the Interior. 78 I.D. 39, 41-42 (1971).

C. The court of appeals erred when it redefined Indian country and departed from this Court's decision in Seymour v. Superintendent, 368 U.S. 351 (1962).

The term "Indian country" is defined in the 1948 Act (18 U.S.C. 1151) as "all land within the limits of any Indian reservation *** notwithstanding the issuance of any patent, ***." In *Seymour*, this Court rejected the contention that "all land" meant "all trust land" and held that it meant all land, fee and trust. (368 U.S. 358.) If *Seymour* controls, the Blue Bull was in violation since it was on fee land on an Indian reservation without a tribal license the court of appeals having already destroyed the "nonIndian communities" exception by declaring it unconstitutionally vague (pp. 9-11, *supra*).

The court of appeals undertook to distinguish *Seymour* on an ad hoc basis, saying that *Seymour* involved a

conflict between state and federal jurisdiction calling for a broad interpretation, whereas cases relating to the control of liquor among Indians presented "no policy or need for a broad interpretation of 'Indian Country' ". (487 F.2d 18.) Even if we assume that "broad interpretation" correctly characterizes the *Seymour* construction of "all land", the court of appeals has raised an irrelevant distinction refuted by 170 years of consistent Federal interest in the control of intoxicants in Indian country.

In making the distinction between broad and narrow interpretations, the court below overlooked the fact that while the Indian criminal laws have application only on reservations, the Indian liquor laws, before the 1953 Act, made it a crime to sell liquor to Indians anywhere in the United States. (See p. 8, *supra.*) This is powerful proof that the Government's concern over Indians and liquor, was ubiquitous and not limited to the reservations. Nothing in this background suggests that when Congress in 1953 (18 U.S.C. 1161), eliminated the discriminatory off-reservation prohibition and simultaneously defined Indian country to include "all land", it intended that phrase to be narrowly construed, rather than broadly construed to accomplish the remedial objective of the legislation.

D. The court of appeals erred in equating Indian tribes with citizens' associations.

The court below expressed the view that essentially an Indian tribe is nothing more than "an association of citizens", a "private, voluntary organization" (487 F.2d 19). These views, if valid would strip tribes of their attributes of sovereignty.

Of course, the court's viewpoint is nothing less than an abandonment of 140 years of Indian law, extending from *Worcester v. Georgia*, 6 Pet. 515 (1832) to *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973). This line of cases holds that by reason of their sovereign attributes, Indian tribes and their people on the reservation are free from state law, subject always to the power of Congress. Also, *Warren Trading Post v. Arizona Tax. Com.*, 380 U.S. 685 (1965); *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Williams v. Lee*, 358 U.S. 217 (1959).

The court of appeals did not justify its extreme position. This Court's landmark decisions concerning tribal sovereignty were not discussed. However, the court of appeals did reject the decision sustaining tribal sovereignty in *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (C.A. 8, 1956), on the ground that the case did not deal with nonIndians but with "the assertion of tribal authority over members of the Tribe and this only." (487 F.2d 19.) The court below did not correctly read the case in question.

Iron Crow concerned the validity of a tribal ordinance under which a tax was imposed on plaintiffs' "*non-members* of the*** Tribe". (231 F.2d 90, emphasis in the original.) In *Iron Crow*, the court held that "[I]nasmuch as it has never been taken from it, the defendant Oglala Sioux Tribe possesses the power of taxation which is an inherent incident of its sovereignty." (*Idem*, p. 99.) To the same effect, *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (C.A. 8, 1958), certiorari denied 358 U.S. 932. The power to tax as an attribute of tribal sovereignty is hardly distinguishable from the power to license. The court of appeals misread *Iron Crow*. The decision below stands as a sore-thumb exception to established law.

Observations that downgrade an Indian tribe to a "an association of citizens" and to a "private, voluntary organization" ordinarily flow from nonfederal sources. Over the years, Indians have learned to recognize such comments as the prelude to action that would deprive them of a right, or a privilege, or property. Comparable attitudes evoked expressions of federal concern for the Nation's tribal wards such as are found in *United States v. Kagama*, 118 U.S. 375, 379-380, 384-385 (1886), and similar cases. While nonIndian neighbors may no longer be a physical threat, there remains the unhappy fact that local residents too often regard reservation Indians as legitimate prey. Unfortunately, local public opinion is indifferent to the Indians' needs, to their complaints, or to the wrongs perpetuated on them. Judicial observations, such as those noted, exacerbate an uneasy situation.

CONCLUSION

The decision below departs from established law and frustrates the sedulous policy of Congress with respect to the regulation of liquor traffic in Indian country. If permitted to stand, the decision will lead to damaging and mischievous results on Indian reservations. The decision should be set aside.

Respectfully submitted,

MARVIN J. SONOSKY
2030 M Street N.W.
Washington, D.C. 20036

Attorney for the Shoshone Tribe of Indians

GLEN A. WILKINSON
1735 New York Avenue, N.W.
Washington, D.C. 20006

Attorney for the Arapahoe Tribe of Indians

APPENDIX A

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WIND RIVER INDIAN AGENCY
FORT WASHAKIE, WYOMING 82514

IN REPLY REFER TO:
Administration
004

March 28, 1974

Mr. Marvin J. Sonosky
2030 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Sonosky:

This letter is in response to your request of March 26 for the information covering the ownership of the reservation, total number of Indians living on the reservation and liquor or beer licenses issued and in effect on the Wind River Indian Reservation and related information.

The following is the breakdown of the acreage as to the ownership of the reservation which we show as Tribal (trust land owned by the Shoshone and Arapahoe Tribes), Allotted (trust land owned by individual Indians), Fee (land removed from trust status which is presently taxable), and Government (owned by the United States and administered by Bureau of Reclamation or Bureau of Indian Affairs).

PORTION OF RESERVATION AFFECTED BY ACT OF MARCH 3, 1905 (33 STAT. 1016)

ALLOTTED	10,214.48
GOVERNMENT	151,234.39
FEE	190,416.81
TRIBAL	1,120,978.35
TOTAL	1,472,844.03

PORTION OF RESERVATION *NOT* AFFECTED BY ACT OF MARCH 3, 1905 (33 STAT. 1016)

ALLOTTED	95,127.16
GOVERNMENT	1,296.15
FEE	38,644.73
TRIBAL	660,095.96
TOTAL	795, 164.00

TOTAL ACREAGE IN RESERVATION: 2,268,008.03

The total number of Indians residing on the entire reservation as compiled by our office is 4,538.

There have been six liquor and/or beer licenses issued through the Fremont County offices on the reservation (excluding the City of Riverton) which are currently in effect and they are listed as follows:

1. Blue Bull Bar, Fort Washakie - Liquor, State Licensed.
2. Harold Campbell, Fort Washakie - Beer, State Licensed.
3. Red Rock Lodge, Burris - Liquor, State Licensed.
4. Dry Creek Lodge, Burris - Liquor, State Licensed.
5. Crowheart Store, Crowheart - Beer, State and Tribal Licensed.
6. Presgroves Bar, Crowheart - Liquor, State Licensed.

The above listed establishments received their state licenses subsequent to the 10th Circuit Court of Appeals decision filed November 8, 1973.

The community of Fort Washakie includes the Bureau of Indian Affairs offices and appurtenant shops for BIA programs; United States Public Health, Division of Indian Health Clinic; Law and Order facilities; Tribal Office Complex; Shoshone Community Building and 49 federal

housing units for employees working for the Bureau of Indian Affairs and Public Health Service. Two housing developments totaling 58 units constructed and administered by the local Tribal Housing Authority are occupied entirely by Indians. The Bureau of Indian Affairs owns and operates the only community water service for the Fort Washakie area. The water service supplies 203 user units including the local school, the Blue Bull Bar and all other businesses mentioned in this correspondence. There are two business establishments within 0.7 mile of the Wind River Agency and the Fort Washakie Post Office that are on non-trust taxable property. They are the Fort Washakie Trading Co., owned by R.V. Greeves, a non-Indian, selling beadwork, southwest silver and turquoise jewelry about 0.4 mile from the agency compound and about 0.7 mile west of the Fort, the local liquor outlet listed as the Blue Buil Bar. Located 0.9 mile south of the Post Office, on the main highway, there is a five-unit motel with ten trailer spaces operated by an Indian on trust land. There is a general store, auto service station and two self-service laundries located 1.3 miles south of Fort Washakie. The area as described is serviced by a volunteer fire department equipped and maintained by the BIA and the large fire truck is limited to service only the Bureau of Indian Affairs, Public Health Service, Tribal Offices and Housing where hydrants have been installed. Fire suppression equipment for range and rural fires is used for fires not serviced by fire hydrants which includes the Fort Washakie Trading Co. and the Blue Bull Bar.

Sincerely yours,

s/ Clyde W. Hobbs
Clyde W. Hobbs
Superintendent